UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE THE RESERVE FUND SECURITIES AND DERIVATIVE LITIGATION	MDL No. 09-md-2011 (PGG)
AMERIPRISE FINANCIAL SERVICES, INC. and SECURITIES AMERICA, INC., Plaintiffs, v. RESERVE MANAGEMENT COMPANY, INC., RESRV PARTNERS, INC., BRUCE BENT SR., BRUCE BENT II, and ARTHUR T. BENT, Defendants.	No. 09-cv-1288 (PGG)

MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS

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Preliminary Statement

This memorandum is submitted on behalf of defendants Reserve Management Company, Inc. ("RMCI"), Resrv Partners, Inc. ("Resrv"), Bruce Bent Sr. ("Bent Sr."), Bruce Bent II ("Bent II"), and Arthur T. Bent ("Arthur") (together referred to as "Defendants") in support of their motion to dismiss the Second Amended Complaint (the "Complaint" or "Complt."[1]) of plaintiffs Ameriprise Financial Services, Inc. ("Ameriprise") and Securities America, Inc. ("SAI") (together referred to as "Plaintiffs") for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6) and failure to comply with the pleading requirements of Fed. R. Civ. P. 9(b) and the Private Securities Litigation Reform Act (the "PSLRA"), and on the ground that their state law claims are preempted by the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 78(bb)(f), and should not, in any event, be allowed to proceed once Plaintiffs' federal claims are dismissed.

Although Plaintiffs have chosen to bring a separate action, their claims could have been pursued in the class action filed on behalf of all those who purchased or held shares of the Reserve Primary Fund (the "Fund") from September 28, 2006 to September 16, 2008 (the "Class Action"). Indeed, all of Plaintiffs' federal claims – and some of their state law claims – are asserted in the Consolidated Complaint in the Class Action (the "Class Action Complaint") from which the Complaint borrows liberally. These claims should be dismissed for the same reasons that the claims in the Class Action Complaint should be dismissed. With respect to the few state law claims unique to Plaintiffs' Complaint, they should be dismissed because, as we explain more fully below, (a) they are preempted by SLUSA, (b) Plaintiffs lack standing to assert them, and (c) they fail to state a claim.

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1 A copy of the Complaint is annexed as Exhibit A to the accompanying declaration of Fran M. Jacobs (the "Jacobs Decl.").

Background

Plaintiffs are affiliated broker-dealers who invested in the Fund, both for their own account and for their customers. They allege that, in 2009, they paid customers who had invested in the Fund up to three cents on the dollar to reimburse them for their Fund losses. In exchange, the customers assigned their claims to Plaintiffs. (Complt. ¶ 26). As assignees, Plaintiffs stand in the shoes of their customers. The Complaint, however, provides no information about Plaintiffs' customers: it does not identify them or state when they invested in the Fund or whether they made any purchases or sales during the relevant period.

Prior to acquiring their customers' claims in 2009, Plaintiffs had already filed two complaints against Defendants. Plaintiffs' original complaint, which also named the Fund itself as a defendant, was filed on September 19, 2008 in the United States District Court for the District of Minnesota. (See Ex. C to Jacobs Decl.) It asserted that (1) the Funds' registration statement (the "Prospectus") violated Section 11 of the Securities Act of 1933 (the "Securities Act") because it did not disclose that information would be "tipped" to certain unidentified institutional investors in September 2008; (2) Defendants' alleged disclosure of information about the Fund's investment in securities issued by Lehman Bros. Holdings, Inc. ("Lehman") violated Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 thereunder; and (3) Defendants breached their fiduciary duty to Plaintiffs when they allegedly "tipped" other investors about the Lehman securities.

Defendants and the Fund moved to dismiss Plaintiffs' original complaint. In response to the motion to dismiss, Plaintiffs, who had been given an opportunity to conduct discovery in the interim, filed an amended complaint. (Ex. D to Jacobs Decl.) The amended complaint dropped the 10b-5 claim altogether, revised the Section 11 claim, repeated the breach of fiduciary duty claim, and added state law claims for violations of Minnesota's Consumer Fraud and False Statement in Advertising Acts, and for breach of the implied covenant of good faith.

Defendants and the Fund moved to dismiss Plaintiffs' amended complaint. The motion to dismiss had not been decided by February 2009 when the Multidistrict Litigation Panel transferred the action to this Court – over Plaintiffs' objection – for coordinated or consolidated pretrial proceedings with fifteen other actions relating to the Fund, including the Class Action. (Ex. E to Jacobs Decl.) In opposing transfer under 28 U.S.C. § 1407, Plaintiffs argued that the claims they asserted were narrower than those in the other actions. Whether or not Plaintiffs were correct then, the Complaint is not now narrower than the claims asserted in the Class Action.

On January 5, 2010, plaintiffs filed the Class Action Complaint consolidating the claims asserted in the various other actions relating to the Fund. (Ex. F to Jacobs Decl.) Two months later, Plaintiffs filed their Second Amended Complaint. (Ex. A to Jacobs Decl.) The latest iteration of the Complaint is an amalgam of the Class Action Complaint and the Minnesota state law claims that Plaintiffs had asserted in their first amended complaint. Although the Complaint is not a word-for-word copy of the Class Action Complaint – it shuffles and paraphrases the allegations in the Class Action Complaint – Plaintiffs adopted wholesale the Class Action plaintiffs' theories that (a) for the period prior to September 15, 2008, Defendants – while pursuing a risky investment strategy – led investors to believe the Fund was like a money market fund and could not lose money (Complt. ¶¶ 40-46, 49-54), and (b) for the period after September 15, 2008, Defendants gave investors the false impression that they would provide credit support or take other steps to protect the Fund's $1.00 NAV following Lehman's bankruptcy filing (Id., ¶¶ 86-95). Plaintiffs also adopted the Class Action plaintiffs' claims for violations of Sections

12(a)(2) and 15 of the Securities Act. And, despite having dropped a Section 10(b) claim in their first amended complaint, Plaintiffs not only included the Class Action plaintiffs' 10(b) claim in the Complaint, they asserted a claim under Section 20(a) of the Exchange Act as well.

Plaintiffs even added the Class Action Complaint's state law claims for common law fraud and gross negligence. The only claims in the Complaint that do not correspond directly to claims in the Class Action Complaint are Counts IX and X in which Plaintiffs purport to sue as private Attorneys General under two Minnesota consumer protection statutes. Since Plaintiffs are not consumers, they would not have standing to assert these claims even if they were not preempted by SLUSA and could survive the dismissal of Plaintiffs' federal claims.

The Complaint

The table set forth below lists the claims asserted in the Complaint alongside their counterparts in the Class Action Complaint:

COMPLAINT	CLASS ACTION COMPLAINT	CLAIM
Count I	Count IV	§ 10(b) of Exchange Act
Count II	Count VI	§ 20(a) of Exchange Act
Count III	Count I	§ 11 of Securities Act
Count IV	Count II	§ 12(a) of Securities Act
Count V	Count III	§ 15 of Securities Act
Count VI	Count IX	Breach of fiduciary duty and aiding and abetting fiduciary breach
Count VII	Count X	Common law fraud
Count VIII	Count XI	Gross negligence
Count IX	---	Minnesota Consumer Fraud Act
Count X	---	Minnesota False Statement in Advertising Act

With the exception of the two claims based on Minnesota statutes which appear in the Complaint, but not in the Class Action Complaint, and the omission of the Class Action

Complaint's claims alleging violations of Sections 13(a) and 36 of the Investment Company Act of 1940 and unjust enrichment, there are no material differences between the claims asserted in the Complaint and those asserted in the Class Action Complaint.

A more detailed discussion of the facts is set forth in the memorandum of law submitted in support of Defendants' motion to dismiss the Class Action Complaint ("Defendants' Class Action Memorandum") and incorporated herein by reference to avoid duplicative briefing and conserve shareholder resources.[2]

POINT I

COUNT I OF THE COMPLAINT DOES NOT STATE A VALID CLAIM FOR SECURITIES FRAUD

A. The Pleading Requirements of the PLSRA Apply to Plaintiffs' Securities Fraud Claim

Like the securities fraud claim asserted in Count IV of the Class Action Complaint, the securities fraud claim asserted in Count I of the Complaint is subject to the heightened pleading requirements of the PSLRA, 15 U.S.C. §§ 78u-4(b)(1) and (2), which provides:

> (b) Requirements for securities fraud actions
>
> (1) Misleading statements and omissions
>
> In any private action arising under this chapter in which the plaintiff alleges that the defendant –
>
> (A) made an untrue statement of a material fact; or
>
> (B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;
>
> the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading,

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2 Defendants' Class Action Memorandum is annexed as Exhibit B to the Jacobs Decl.

> and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.
>
> (2) Required state of mind
>
> In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.
>
> (Emphasis added.)

See Stoneridge Investment Partners, LLC v. Scientific Atlanta, Inc., 552 U.S. 148, 165 (2008) (PSLRA "imposed heightened pleading requirements and a loss causation requirement upon 'any private action' . . ."); ECA v. JP Morgan Chase Co., 553 F.3d 187, 196 (2d Cir. 2009) ("Any complaint alleging securities fraud must satisfy the heightened pleading requirements of the PSLRA and Fed. R. Civ. P. 9(b) by stating with particularity the circumstances constituting the fraud"); Simon DeBartolo Group, LP v. Richard E. Jacobs Group, Inc. 985 F. Supp. 427, 430 (S.D.N.Y. 1997), aff'd in part and rev'd in part on other grounds, 186 F.3d 157 (2d Cir. 1999) ("nothing in the legislative history . . . indicates that the phrase 'in any private action' in Section 21D(c) [15 U.S.C. § 78u-4(c)(1)] was intended to be limited to 'class actions' . . ."; "where Congress intended to limit the applicability of certain provisions of the PSLRA to class actions, it did so expressly").

For the reasons more fully set forth in Defendants' Class Action Memorandum, Plaintiffs' 10b-5 claim does not satisfy the pleading requirements of the PSLRA and also does not allege any actionable misstatements. (See Ex. B to Jacobs Decl., §§ I-IV.)

B. SAI Lacks Standing to Sue for Securities Fraud

Plaintiffs have not established that each has standing to sue for violations of 10b-5. The law makes clear that "private litigants may only bring an action under Rule 10b-5 when they are themselves the purchasers or sellers of securities in question." Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 395 F.3d 25, 37 (2d Cir. 2005), vacated on other grounds, 547 U.S. 71 (2006).

SAI does not contend that it or its customers made any purchases or sales of Fund shares after September 12, 2008. (See Compl. ¶ 20.) In fact, Defendants pointed out in their motion to dismiss Plaintiffs' initial complaint that "SAI only states that by September 12, 2008, it invested $28 million of its own capital in the Primary Fund." Although Plaintiffs have been on notice of this defect since Defendants' first motion to dismiss was served in late 2008, they made no attempt to cure it when they amended the Complaint a year and one-half later.

Accepting the allegations of the Complaint as true, it alleges that SAI was nothing more than a holder of securities at the time of the alleged fraud. As such, SAI does not have standing to sue. Abrahamson v. Fleschner, 568 F.2d 862, 868 (2d Cir. 1977), cert. denied, 463 U.S. 913 (1978) ("requirement of fraud in connection with the purchase or sale of a security is not satisfied by an allegation that plaintiffs were induced fraudulently not to sell their securities"); Winer Family Trust v. Queen, 503 F.3d 319, 325 (3d Cir. 2007) ("There is no private right of action under Rule 10b-5 for mere holders of securities"). Since "standing is at heart 'a jurisdictional prerequisite to a federal court's deliberations,'" Thompson v. County of Franklin, 15 F.3d 245, 248 (2d Cir. 1994) (citation omitted), SAI's lack of standing bars its 10b-5 claim.

POINT II

PLAINTIFFS' OTHER FEDERAL CLAIMS SHOULD BE DISMISSED

A. Defendants Cannot Be Liable Under § 20(a) of the Exchange Act

Defendants cannot be liable under § 20(a) of the Exchange Act because, as Defendants' Class Action Memorandum explains (Ex. B to Jacobs Decl., § IV), the Complaint fails to plead a primary violation. Count II of the Complaint should therefore be dismissed.

B. The Complaint Does Not Adequately Plead a Violation of § 11 of the Securities Act

Plaintiffs' claim under Section 11 of the 1933 Act cannot stand against any of the Defendants because it does not allege an actionable misstatement and fails to satisfy the particularity requirements of Fed. R. Civ. P. 9(b). Moreover, a claim under Section 11 can only be asserted against issuers, directors, and underwriters. Since RMCI was not an issuer, director, or underwriter, it cannot be liable for violating Section 11.

A more complete discussion of the flaws in Plaintiffs' Section 11 claim appears in Defendants' Class Action Memorandum (Ex. B to Jacobs Decl., §§ I-III), which Defendants incorporate by reference.

C. Defendants Cannot Be Liable Under § 12(a)(2) of the Securities Act

There is no basis for imposing liability on Defendants under Section 12(a)(2) of the Securities Act because they were not "sellers" within the meaning of Section 12(a)(2) and for the same reasons that Plaintiffs' claim under Section 11 should be dismissed – because the Prospectus was not materially misleading and because the claim should have been, but was not, pled with particularity. These arguments are set forth in greater detail in Defendants' Class Action Memorandum. (Ex. B to Jacobs Decl., §§ I-III.)

D. Count V Should Be Dismissed Because There Is No Basis for Control Person Liability Under § 15 of the Securities Act

Since Plaintiffs' claims under Sections 11 and 12(a)(2) of the Securities Act are legally insufficient, Plaintiffs cannot establish a primary violation for which Defendants can be liable as control persons under Section 15 of the Securities Act. Accordingly, for the reasons set forth in Defendants' Class Action Memorandum (Ex. B to Jacobs Decl., § IV), Plaintiffs' Section 15 claim should be dismissed.

POINT III

PLAINTIFFS' STATE LAW CLAIMS SHOULD BE DISMISSED BECAUSE THEY ARE PREEMPTED BY SLUSA AND OTHERWISE NOT VIABLE

A. SLUSA Is Applicable Here

1. This Case Qualifies as a Covered Class Action

SLUSA provides that "[n]o covered class action based upon the statutory or common law of any State . . . may be maintained in any State or Federal court by any private party alleging . . . a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1)(A). An action is preempted under SLUSA if four conditions are satisfied: "(1) the action is a 'covered class action,' (2) the claims are based on State law, (3) the action involves a 'covered security,'[3] and (4) the claims allege a misrepresentation or omission of material fact 'in connection with the purchase or sale' of the security." In re Worldcom, Inc. Sec. Litig., 308 F. Supp. 2d 236, 243 (S.D.N.Y. 2004). Defendants' Class Action Memorandum establishes that the last three conditions are satisfied and, for the reasons set forth below, the first condition is also satisfied here.

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[3] A mutual fund is a "covered security." Kenneth Rothschild Trust v. Morgan Stanley Dean Witter, 199 F.3d 993, 1000 (C.D. Cal. 2002).

SLUSA defines a "covered class action" as either (a) "any group of lawsuits filed in or pending in the same court and involving common questions of law or fact in which (I) damages are sought on behalf of more than 50 persons; and (II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose," 15 U.S.C. § 78bb(f)(5)(B)(ii), or (b) "any single lawsuit" in which "damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members." Whichever test is used, this action qualifies as a "covered class action."

This action is part of a group of lawsuits involving common questions of law and fact in which damages are sought on behalf of more than 50 persons, and it has been consolidated with the Class Action for pretrial processing pursuant to 28 U.S.C. § 1407. (See Ex. E to Jacobs Decl.) It therefore constitutes a "covered class action." Under similar circumstances, the court in In re Worldcom, Inc. Sec. Litig., supra, 308 F. Supp. 2d 236, held that ten non-class actions, which had been transferred by Multidistrict Panel and consolidated for pre-trial proceedings with a pending class action, should be treated as "covered class actions." The court explained that, because the ten actions and the class action had been consolidated for pretrial proceedings, they were "proceed[ing] as a single action for any purpose" – which is all SLUSA requires – and the state claims were therefore preempted. Id., 308 F. Supp. 2d at 246. Accord Gordon Partners v. Blumenthal, 2007 U.S. Dist. LEXIS 9110, at *56 (S.D.N.Y. Feb. 9, 2007) (because "SLUSA does not require that the group of lawsuits be consolidated for trial, or for 'all' purposes" and "refers to the cases proceeding 'as a single action for *any* purpose,'" court concluded that "consolidation [of individual action with class action] for discovery satisfies the 'any purpose' language") (emphasis in original).

Alternatively, this action constitutes a single lawsuit in which damages are sought on behalf of more than 50 persons. Plaintiffs are suing on their own behalf and as assignees of their customers' claims. According to the first amended complaint, more than 150,000 Ameriprise client accounts had invested in the Fund (Ex. D to Jacobs Decl., ¶ 9), and more than 175,000 SAI client accounts had also invested in the Fund (Id. ¶ 11). Plaintiffs are thus seeking damages on behalf of well in excess of 50 persons. La Sala v. Bordier et Cie., 519 F.3d 121, 134 (3d Cir. 2008) (term "persons" in SLUSA, 15 U.S.C. § 78bb(f)(5)(B)(i), refers "to the original owners of the claim – those injured by the complained-of conduct . . . . In other words, the phrase refers to the assignors of a claim, not to the assignee"); RGH Liquidating Trust v. Deloitte & Touche LLP, 71 A.D.3d 198, 891 N.Y.S.2d 324, 326 (1st Dep't 2009) ("SLUSA bars the assertion of the bondholders' claims in this single action because these claims, which did not originally belong to RGH itself, seek recovery under state law on behalf of more than 50 persons for injuries allegedly arising from misrepresentations relating to the purchase or sale of securities traded on a national exchange").

Nor can Plaintiffs deny that this action and the Class Action involve common questions of law or fact. Eight of the claims asserted in the Complaint and the Class Action Complaint are the same, and there has already been a determination that the two actions involve common questions of law and fact. In its Transfer Order, the Multidistrict Panel explicitly found:

> All actions share factual questions arising from (1) alleged misrepresentations and/or omissions by defendants surrounding the time that the Primary Fund "broke the buck" on September 16, 2008, and (2) the halting of Primary Fund redemptions. Whether the actions are brought by Primary Fund holders seeking relief under various federal securities laws and/or common law or a

> shareholder suing derivatively on behalf of the Primary Fund, all actions can be expected to focus on a significant number of common events, defendants, and/or witnesses.
>
> (Ex. E to Jacobs Decl., p. 1.)

Since the action is part of a group of lawsuits with shared factual and legal issues which have been consolidated for pre-trial purposes and which seek damages on behalf of more than 50 persons, it constitutes a "covered class action," and SLUSA applies.

2. Plaintiffs' State Law Claims for Breach of Fiduciary Duty, Fraud, and Violations of Two Minnesota Statutes Are Preempted by SLUSA

SLUSA preempts state law claims which allege misrepresentations in connection with the purchase or sale of a covered security. Of the five state law claims asserted in the Complaint, all except the gross negligence claim clearly sound in fraud and are therefore preempted by SLUSA.

Defendants' Class Action Memorandum explains why SLUSA preempts Plaintiffs' claim for common law fraud. (See Ex. B to Jacobs Decl., § IX.) There is another reason why SLUSA preempts the breach of fiduciary duty claim asserted in the Complaint. Unlike Count IX of the Class Action Complaint, which does not specifically allege misrepresentations, Count VI of the Complaint alleges that Defendants made "selective disclosures to certain investors." (Complt. ¶ 197(d).) The Complaint thus charges that Defendants breached their fiduciary duty by omitting to provide information in connection with the purchase and sale of Fund shares. Where a claim for breach of fiduciary duty rests on a misrepresentation, it is preempted. In re Eaton Vance Mut. Funds Fee Litig., 380 F. Supp. 2d 222, 241-242 (S.D.N.Y. 2005) (claims that defendants breached fiduciary preempted by SLUSA); see also Dacey v. Morgan Stanley Dean Witter & Co., 263 F. Supp. 2d 706, 710 (S.D.N.Y. 2003) ("although the Complaint asserts only one count of breach of contract, its operative allegations plainly focus on misrepresentations and other alleged breaches of disclosure duties," making SLUSA applicable and preempting state law claim).

Plaintiffs' claims for violation of two Minnesota consumer protection statutes are also preempted by SLUSA. In Count IX of the Complaint, which charges Defendants with violating Minnesota's Consumer Fraud Act (the "Consumer Fraud Act"), Plaintiffs allege that Defendants "engaged in deceptive practices . . . by failing to provide Plaintiffs with the information it had provided other investors." (Compl. ¶ 209.) Since Count IX on its face alleges an omission in connection with the sale of a covered security, it is subject to SLUSA. Prof'l Mgmt. Assocs., Inc. Employees' Profit Sharing Plan v. KPMG LLP, 335 F.3d 800, 802-803 (8th Cir. 2003) (SLUSA held to preempt claims under Consumer Fraud Act, breach of fiduciary duty, and negligent misrepresentation).

In Count X of the Complaint, Plaintiffs allege that Defendants violated Minnesota's False Statement In Advertising Act (the "False Statement Act") by "disseminat[ing] untrue, deceptive, and/or misleading claims in their Prospectuses, Registration Statement, and other public statements regarding (1) their investment strategy; (2) the method in which information is disseminated to shareholders; and (3) the methods by which redemption requests would be handled." (Compl. ¶ 214.) These allegations clearly sound in fraud. They also underlie Plaintiffs' claims under Rule 10b-5 and Sections 11 and 12(a)(2) of the Securities Act, and are therefore preempted by SLUSA.

B. Plaintiffs' State Law Claims Should Be Dismissed Under Fed. R. Civ. P. 12(b)(6)

Even if they were not preempted by SLUSA, Plaintiffs' state law claims would be subject to dismissal under Fed. R. Civ. P. 12(b)(6). Like the Class Action plaintiffs, Plaintiffs in this case do not purport to have made a demand prior to suing and therefore cannot maintain derivative claims such as claims for breach of fiduciary duty and negligence. (See Ex. B to Jacobs Decl., § VII.) The reasons why Plaintiffs' claims for fraud (Count X), gross negligence (Count XI), and breach of fiduciary duty and aiding and abetting a breach of fiduciary duty (Count III) should be dismissed are set forth in Sections VII(A) and (B), VIII, and IX of Defendants' Class Action Memorandum and incorporated by reference here.

With respect to Plaintiffs' claims under the Consumer Fraud and False Statement Acts, they should also be dismissed as a matter of law because (1) Plaintiffs lack standing to sue as private attorneys general; (2) as sophisticated broker-dealers, Plaintiffs are not within the class of vulnerable parties that the Minnesota statutes are intended to protect; (3) Plaintiffs have not adequately pled loss causation; and (4) Plaintiffs have not pled fraud with particularity.

1. Plaintiffs Lack Standing to Sue Under the Minnesota Consumer Protection Statutes

The Consumer Fraud and False Statement Acts authorize the state Attorney General to bring proceedings to enforce their provisions. Minn. Stat. Ann. § 325F.70. Neither statute creates a private right of action. The Consumer Fraud Act, Minn. Stat. Ann. § 325F.69(1) provides:

> The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoinable as provided in section 325F.70.

The False Statement Act, Minn. Stat. Ann. § 325.67F, in turn, states that a person who makes a false statement in an advertisement is guilty of a misdemeanor, and it provides that "[t]he duty of a strict observance and enforcement of this law and prosecution for any violation thereof is hereby expressly imposed upon the attorney general, and it shall be the duty of the county attorney of any county wherein a violation of this section shall have occurred, upon complaint being made, to prosecute any person violating any of the provisions of this section."

Private litigants may bring civil actions under these two statutes only if they qualify under Minnesota's private Attorney General law, Minn. Stat. Ann. § 8.31, which requires a showing that their claims, if successful, will yield a public benefit. Ly v. Nystrom, 615 N.W.2d 302, 314 (Minn. 2000) ("[T]he Private AG Statute applies only to those claimants who demonstrate that their cause of action benefits the public"). To satisfy the "public benefit" standard, the action must benefit the public-at-large, and not merely a limited group of investors. See Flora v. Firepond, Inc., 260 F. Supp. 2d 780, 788 (D. Minn. 2003) (where Consumer Fraud Act claim was based on statements made in connection with lock-up agreement that all shareholders were asked to sign, it was court dismissed because "[t]here were no communications to the general public, nor was there any way for the non-shareholding public to participate in or be affected by the lock-up agreements. Since a private action would not benefit the public, plaintiffs have no private right of action under Minn. Stat. §§ 325F.68 and 8.31(3a)")

Plaintiffs' claims under the Consumer Fraud and False Statement Acts are not directed toward procuring any benefit for the public-at-large. The claims do not even benefit all Reserve investors. Rather, Plaintiffs are only seeking damages for their own personal account. (Complt. ¶¶ 26-27, 148). The fact that Plaintiffs have chosen to pursue their own claim and are not participating in the class action confirms that this action represents nothing more than a private dispute between private litigants.

2. Plaintiffs Are Not Within the Class of Individuals Minnesota's Consumer Protection Statutes Were Intended to Protect

Plaintiffs' Consumer Fraud and False Statement Acts claims suffer from another fundamental defect. The Acts are aimed at protecting "consumers" and are meant "to address the unequal bargaining power that is often found in consumer transactions." Wiegand v. Walser Auto. Groups, Inc., 683 N.W.2d 807, 812 (Minn. 2004). They are not meant to protect sophisticated parties like Plaintiffs – broker-dealers who regularly engage in billions of dollars of securities transactions. Marvin Lumber & Cedar Co. v. PPG Indus., 223 F.3d 873, 888 (8th Cir. 2000) ("Minnesota's false advertising statute is primarily designed to protect consumers, not sophisticated merchants.").

As registered broker-dealers in the business of making investments for their own account and on behalf of their clients, Plaintiffs are merchants, not consumers, and they therefore cannot maintain a claim under the Minnesota consumer protection statutes. Stephenson v. Deutsche Bank AG, 282 F. Supp. 2d 1032, 1069 (D. Minn. 2003) (broker-dealer plaintiffs could not sue under Consumer Fraud Act).

Moreover, a claim under the Consumer Fraud Act requires that the fraudulent statement be made in conjunction with the sale of "merchandise." Minn. Stat. Ann. § 325F.69. The statute defines "merchandise" as "any objects, wares, goods, commodities, intangibles, real estate, loans, or services," Minn. Stat. Ann. § 325F.68, and this definition does not include securities. The False Statement Act, on the other hand, refers to both merchandise and securities – something it would not have to do if merchandise encompassed securities. The Minnesota legislature has also enacted a separate statutory scheme (the Minnesota Securities Act) to address securities violations. Accordingly, the Consumer Fraud Act is not needed to address misrepresentations in connection with the sale of securities.

3. Plaintiffs Do Not Sufficiently Allege Loss Causation

Even if Plaintiffs had brought their consumer protection claims for the benefit of the public or were the type of unsophisticated consumers that statutes were meant to protect, their claims would still fail because they have not pled loss causation. A plaintiff suing under the Consumer Fraud Act must make the same showing of loss causation that must be made by a plaintiff suing under the federal securities law. As the court held in Schaaf v. Residential Funding Corp., 517 F.3d 544, 552 (8th Cir. 2008):

> We thus conclude that the MCFA's [Consumer Fraud Act's] requirement that a plaintiff be "injured by" conduct of the defendant does not allow for recovery unless a plaintiff can show that the defendant's action proximately caused the plaintiff's losses. Because Dura and other federal cases address the standard for proximate causation in cases of securities fraud, we find them instructive. To prevail, the plaintiffs must plead and prove that the loss was foreseeable and caused by the materialization of the concealed risk.

Defendants did not conceal the Fund's investment in Lehman paper; it was included in the list of investments that the Fund filed quarterly on Form N-Q. (See Ex. G to Jacobs Decl.) Plaintiffs therefore cannot establish the loss causation element of their Minnesota statutory claims.

4. The Complaint Does Not Plead Fraud With the Requisite Degree of Particularity

The heightened pleading standards of Rule 9(b) must be satisfied for claims based on the Minnesota consumer protection statutes because the gravamen of those claims is fraud. Drobnak v. Andersen Corp., 2008 WL 80632, at *4 (D. Minn. Jan. 8, 2008) ("Rule 9(b) also governs Plaintiffs' claims based on alleged violations of the Minnesota consumer-protection statutes"); Motley v. Homecomings Fin., LLC, 557 F. Supp. 2d 1005, 1011 n. 6 (D. Minn. 2008) (Fed. R. Civ. P. 9(b) applies to "unfair and deceptive practices" statutes, including the Consumer Fraud Act). Under Rule 9(b), a party "alleging fraud or mistake a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b).

To satisfy Rule 9(b)'s particularity requirement, a complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." Lerner v. Fleet Bank, N.A., 459 F.3d 273, 290 (2d Cir. 2006); see also Chill v. Gen. Elec. Co., 101 F.3d 263, 267 (2d Cir. 1996) ("[A]ctual fraudulent statements or conduct and the fraud alleged must be stated with particularity"). For the same reasons that Plaintiffs' securities fraud claims should be dismissed because they were not pled with particularity, their Consumer Fraud Act and False Statement Act claims should also be dismissed. (See Ex. B to Jacobs Decl., § I.)

C. The Court Should Decline to Exercise Supplemental Jurisdiction

Even if the state law claims were viable – and they are not – the Court should decline to exercise supplemental jurisdiction over them in the event that the federal claims are dismissed. The reasons why this court should decline supplemental jurisdiction are set forth in greater detail in Section X of Defendants' Class Action Memorandum and incorporated herein.

CONCLUSION

For the reasons set forth above, and in Defendants' Class Action Memorandum, it is respectfully submitted that Plaintiffs' Second Amended Complaint should be dismissed with prejudice.

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